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Commercial Speech - An End in Sight to Chrestensen?

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COMMERCIAL SPEECH—AN END IN SIGHT TO *CHRESTENSEN*?

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[1] the United States Supreme Court held that a municipal human relations ordinance,[2] which prohibited a newspaper from publishing its help-wanted classified advertising under sex-designated column headings, did not abridge freedom of speech and press.[3] The case reinforces the prevailing view that commercial speech is not fully protected by the first amendment. This note will examine the Court's traditional approach to governmental abridgement of commercial speech, will analyze the treatment of commercial speech in *Pittsburgh Press* and will propose that the Court no longer exclude commercial speech from first amendment protection merely because of the commercial nature of the expression.

The litigation which culminated in the *Pittsburgh Press* opinion began on October 9, 1969, when the National Organization for Women, Inc. (NOW) filed a complaint with the Pittsburgh Commission on Human Relations (Commission). NOW alleged in its complaint that the Pittsburgh Press Company (Pittsburgh Press) violated the Human Relations Ordinance of the City of Pittsburgh[4] by "[a]llowing employers to place adver-

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1. 413 U.S. 376 (1973).

2. *See* note 4 *infra.*

3. Pittsburgh Press also argued that the Ordinance violated the due process clause of the fourteenth amendment since there was no rational connection between sex-designated column headings and sex discrimination in employment. The Court summarily rejected this argument. 413 U.S. at 381 n.7.

4. PITTSBURGH, PA., ORDINANCES § 8 (1967), *as amended*, PITTSBURGH, PA., ORDINANCES § 20 (1969) [hereinafter cited as ORDINANCES] provides:

> It shall be an unlawful employment practice . . . except where based upon a bona fide occupational exemption certified by the Commission . . . .
>
> (a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex. . . .
>
> . . . .
>
> (e) For any "employer," employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to "employment" or membership which indicates any discrimination because of . . . sex. . . .
>
> . . . .

tisements in the male or female columns, when the jobs advertised obviously [did] not have bona fide occupational qualifications or exceptions[5] . . . ."[6] The Commission found the complaint to set forth probable cause that Pittsburgh Press violated the Ordinance. Following the procedures specified in the Ordinance,[7] the Commission, on January 15, 1970, commenced public hearings at which NOW, Pittsburgh Press and other interested organizations[8] presented their evidence and arguments.

On July 23, 1970, the Commission issued a decision and order[9] finding that in 1969 Pittsburgh Press published help-wanted advertisements in sex-designated columns[10] at the direction of the advertisers. If an adver-

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(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance . . . .

The complaint filed against the Pittsburgh Press "charge[d] the Pittsburgh Press with deliberate and constant violations of Section 8(j) . . . ." Complaint of NOW, reprinted in Appendix to the Brief for Appellant at 4a.

5. The Ordinance applies to employers employing five or more employees and specifically exempts "any religious, fraternal, charitable or sectarian organization which is not supported in whole or part by any governmental appropriation." ORDINANCES § 4(c).

6. Complaint of NOW, reprinted in Appendix to the Brief for Appellant at 4a.

7. ORDINANCES § 13 provides:

(e) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it may attempt to eliminate the unlawful practice by means of private conferences or meetings with all parties. . . .

. . . .

(g) In any case of failure to eliminate the unlawful practice charged in the complaint by means of informal proceedings . . . the Commission may hold a public hearing to determine whether or not an unlawful practice has been committed . . . .

8. The Allegheny County Conference on Civil Rights, the National Association of Women Lawyers, the Pennsylvania Human Relations Commission and the Women's Equity Action League appeared as amici curiae on behalf of complainant, NOW, while the American Newspaper Publishers Association appeared as amicus curiae for the Pittsburgh Press. Brief for Appellee at 3.

9. The Commisssion's Decision and Order is reprinted in the Appendix to the Petition for Certiorari at 1a-18a.

10. The Pittsburgh Press labeled its "help-wanted" columns "Male Help Wanted," "Female Help Wanted," and "Male-Female," until October 1969 when it began using the headings "Jobs-Male Interest," "Jobs-Female Interest," and "Male-Female," together with a "Notice to Job Seekers":

Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the ad-

tiser did not specify whether it desired a male or female for the advertised job the Pittsburgh Press would ask the advertiser its preference. The Commission ruled that Pittsburgh Press violated the Ordinance[11] by aiding the advertisers "to cause to be published . . . advertisement[s] relating to 'employment' . . . which indicate[d] . . . discrimination because of . . . sex."[12] The Pittsburgh Press was ordered to cease and desist from violating the Ordinance by eliminating all references to sex in its classification of help-wanted advertising.[13]

The Court of Common Pleas of Allegheny County, on March 24, 1971, affirmed the order of the Commission,[14] and on January 27, 1972, the Commonwealth Court of Pennsylvania modified the order to allow references to sex in the column headings for employment advertising exempt under the Ordinance or certified by the Commission to be exempt because of a bona fide occupational qualification.[15] On June 21, 1972, the Supreme Court of Pennsylvania denied appeal.[16]

The United States Supreme Court, in an opinion written by Justice Powell,[17] affirmed. The Court held that the newspaper's editorial judgment in allowing advertisers to classify help-wanted advertisements, merges with the advertisements themselves into an "integrated commercial statement" which is unprotected by the first amendment. The unprotected status especially applies when the commercial activity proposed by the advertisements (*i.e.* employment discrimination) "is illegal and the restriction on advertising [is] incidental to a valid limitation on economic activity."[18] The Court also decided that no prior restraint existed since "the order [was] based on a continuing course of repetitive conduct

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vertiser will consider applicants of either sex in compliance with the laws against discrimination.

413 U.S. at 379, 381 n.7.

11. The Commission specifically held that the Pittsburgh Press violated ORDINANCES § 8(j). 413 U.S. at 380.

12. ORDINANCES § 8(e).

13. 413 U.S. at 379-80.

14. Brief for Respondents at 6. The opinion of the Court of Common Pleas of Allegheny County is reprinted in the Appendix to the Petition for Certiorari at 19a-45a.

15. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972).

16. Brief for Respondent at 7.

17. Justices Brennan, White, Marshall and Rehnquist joined with the majority opinion. Chief Justice Burger and Justices Douglas, Stewart, and Blackmun filed dissenting opinions.

18. 413 U.S. at 389.

. . . . [and] the order [was] clear and [swept] no more broadly than [was] necessary."[19]

Not only is *Pittsburgh Press* significant because it validates an ordinance prohibiting newspapers from publishing sex-classified help-wanted advertisements,[20] but it is also significant as one of the few Supreme Court opinions to discuss the first amendment impact on governmental abridgement of commercial speech. *Pittsburgh Press* is the first Supreme Court opinion to uphold *content* regulation of commercial newspaper advertisements under the doctrine that "purely commercial speech" is not entitled to the protection of the first amendment. However, the Court's opinion contains significant dictum that commercial advertisements, in some situations, may serve first amendment interests which could prevail when balanced against the governmental interest in regulation.[21] Such a recognition of the first amendment interests represented by commercial speech, if formally adopted by the Court,[22] would mark a departure from the traditional doctrine that purely commercial speech is not protected by the first amendment.

Early Supreme Court opinions[23] upholding governmental regulation of

19. *Id.* at 390. This note will focus on the protection of commercial speech under the first amendment aspect of the Court's holding. For a discussion of the prior restraint aspect of this case *see The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 158-60 (1973).

20. *Cf.* National Org. for Women v. Gannett Co., Inc., 40 App. Div. 2d 107, 338 N.Y.S.2d 570 (1972), and National Org. for Women v. Buffalo Courier-Express, Inc., 71 Misc. 2d 917, 337 N.Y.S.2d 608 (Sup. Ct. 1972) holding that a newspaper publishing help-wanted advertisements in sex-designated columns must intend to participate in unlawful discriminatory conduct to violate N.Y. EXEC. LAW § 296 (McKinney 1972), a human relations law similar to the Pittsburgh Ordinance. *See also* Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (N.D. Cal. 1970), *aff'd*, 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973) and Greenfield v. Field Enterprises, Inc., 4 E.P.D. § 7763 (N.D. Ill. 1972) holding that the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b) (1970) prohibiting sex discriminating advertisements, only applies to employers, labor organizations and employment agencies and that newspapers were not intended by Congress to be included in the term "employment agency." For a general discussion of legal attacks against sex discrimination in "help-wanted" advertising *see* Boyer, *Help-Wanted Advertising—Everywomen's Barrier*, 23 HASTINGS L. REV. 221 (1971).

21. 413 U.S. at 389.

22. Justice Douglas considers commercial speech to be within the scope of the first amendment. 413 U.S. at 397-98 (dissenting opinion); Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (dictum) (concurring opinion); and Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971) (dissenting to denial of certiorari). *See also* Lehman v. City of Shake Heights, 42 U.S.L.W. 5116, 5121 n.6 (U.S. June 26, 1974) (Brennan, J., dissenting).

23. *See* Packer Corp. v. Utah, 285 U.S. 105 (1932) upholding a Utah statute which forbade advertising of cigarettes and other tobacco products on billboards. The Court did not discuss whether this statute violated the first amendment but sustained the statute against equal protection, due process and commerce clause challenges. In Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911), the Court

commercial advertising side-stepped the issue of whether commercial advertising was protected "speech." It was not until 1942, in *Valentine v. Chrestensen*,[24] that the Court distinguished "purely commercial advertising" from "information and opinion" which is entitled to the full protection of the first amendment. Chrestensen charged the public an admission fee to tour his submarine exhibit in New York City and was arrested distributing handbills advertising the attraction. The police charged him with violating a section of the municipal sanitary code which prohibited the distribution of advertising handbills on the streets.[25] The Court held the municipal ordinance did not unconstitutionally abridge freedom of press and of speech.[26] Yet, while the Court limited the first amendment protection of commercial speech, the Court did not adequately define commercial speech, nor indicate what protection, if any, it should be given.

The *Chrestensen* standard to determine whether the expression was "purely commercial advertising" has been subsequently labeled the "primary purpose test."[27] Chrestensen attempted to circumvent the New York City Sanitary Code by distributing a double-faced handbill: on one side was the submarine exhibit advertisement and on the reverse side was a protest against the city for not allowing him to exhibit his submarine at a municipal pier. Focusing on Chrestensen's intent, the Court concluded that the protest was employed on the reverse side solely to evade

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upheld a New York City ordinance prohibiting exterior advertising on motor vehicles against equal protection and contract clause challenges. *See also* Head v. New Mexico Bd., 374 U.S. 424 (1963) holding constitutional a statutory prohibition of price advertising by optometrists where the first amendment issue was not properly raised; Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) reaffirming the holding of *Fifth Ave.*

24. 316 U.S. 52 (1942).

25. *Id.*

26. *Id.* In Schneider v. Town of Irvington, 308 U.S. 147 (1939), the Court held that a municipal ordinance prohibiting the distribution of "any hand-bill" "along or upon any street" violated the first amendment. Since the Court in *Christensen* upheld a similar law which applied solely to advertising matter, the Court did not consider advertising entitled to the full protection of the first amendment. *See also* discussion by Justice Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 276-77 (1951) (concurring opinion).

27. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 451 (1971). *See also Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1028 (1967):

> [T]he Supreme Court has made use of a crude 'main purpose' test to determine the category within which the questioned activity should fall, but this test provides no measure of the extent to which the function of the first amendment demand that a particular expression be free from a particular regulation.

the ordinance, and thus not entitled to first amendment protection.[28] The Court did not elaborate on the applicability of this test beyond the limited situation where one includes traditionally protected speech on an advertisement solely to avoid regulation of the advertisement.

The second question raised by *Chrestensen*—the extent of first amendment protection, if any, given to "purely commercial advertising"—involves the scope of the first amendment.[29] It is difficult to find the answer from a reading of *Chrestensen* since the opinion, written by Justice Roberts, is quite brief and gives no decisions or analysis to support its holding. The opinion merely states that

> the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[30]

Federal[31] and state[32] courts have interpreted this language to mean that "purely commercial advertising" is not entitled to *any* first amendment

28. 316 U.S. at 55.

29. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) and Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 for discussions on the scope of the first amendment by two preeminent first amendment theorists.

30. 316 U.S. at 54.

31. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (1971) holding, *inter alia*, that SEC Rule 10b-5, interpreted to prohibit mere negligence in the issuance of a corporate press release did not violate the first amendment since "the First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech (citing *Chrestensen*)." In Jenness v. Forbes, 351 F. Supp. 88, 96-97 (D.R.I. 1972) the court in discussing a naval air station's commanding officer restricting commercial activities within the housing area of the air station stated that "the restrictions on such activities involves neither the denial of any constitutional right nor the exercise of a peculiarly military authority. Commercial speech is not protected by the first amendment (citing *Chrestensen*) . . . ." The court in Patterson Drug Co. v. Kingerly, 305 F. Supp. 821, 825 (W.D. Va. 1969), in upholding a Virginia statute prohibiting drug retailers from advertising price and terms of sale of prescription drugs stated that the "regulation of commercial advertising does not intrude upon First Amendment rights of free speech." *See also* United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972); SEC v. Wall Street Transcript Corp., 422 F.2d 1371, 1379-81 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970); New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 996-97 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Brazhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Pollak v. Public Util. Comm'n, 191 F.2d 450, 456-57 (D.C. Cir. 1951) (dictum), *rev'd on other grounds*, 343 U.S. 451 (1952); Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 132 (N.D. Ind. 1973); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C. Cir. 1971), *aff'd mem., sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

32. Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 57, 64 Cal. Rptr. 430, 434, 434 P.2d 982, 986 (1967) holding unconstitutional as a violation

protection. These courts have extended *Chrestensen* beyond its facts and explicit holding that states can prohibit, for the purpose of preventing litter, the distribution of advertising handbills on public streets, and have cited *Chrestensen* as authority for excluding commercial advertising from first amendment protection.[33] A minority of federal[34] and state[35] courts

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of the first amendment a public transit district's policy of accepting commercial and political election advertisements while rejecting all other political and controversial advertisements. The court found this policy to reverse "acceptable priorities" and to "perversely give preference to commercial advertising over nonmercantile messages" since "[a] long line of decisions has established the rule that commercial messages do not come within the orbit of the First Amendment and may be regulated or prohibited by the Government in the same manner as other business affairs (citing *Chrestensen*)"; Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 346, 225 A.2d 728, 739 (1966) upholding a state statute prohibiting pharmacists from advertising prices of prescription drugs. In response to the pharmacist's claim that the statute violated the first amendment freedom of speech the court responded that "[s]uch [first amendment] guaranties impose no such restraint upon governmental regulation of purely commercial advertising (citing *Chrestensen*)"; Bigelow v. Virginia, 213 Va. 191, 191 S.E.2d 173 (1972), *vacated*, 413 U.S. 909 (1973), upholding a conviction of a local newspaper publisher for "encourag[ing] or prompt-[ing] the procuring of abortion" by publishing an advertisement for out-of-state legal abortions. Relying on *Chrestensen*, the court held that "the First Amendment imposed no restraint upon proscription by states and localities of purely commercial advertising . . ." ; HM Distrib. of Milwaukee v. Dep't of Agriculture, 55 Wis. 2d 261, 272-73, 198 N.W.2d 598, 605 (1972) upholding state department of agriculture rules prohibiting the promoting of a "chain distributor scheme" not violative of freedom of speech since "[t]he United States Supreme Court has held that the constitutional protection afforded free speech does not apply to commercial advertising (citing *Chrestensen*) . . . ." *See also In re* Philpie, 82 Nev. 215, 414 P.2d 949 (1966).

33. *See* notes 31 and 32 *supra* and cases cited therein.

34. Rowan v. U.S. Post Office Dep't, 300 F. Supp. 1036, 1044 (C.D. Cal. 1969), *aff'd*, 397 U.S. 728 (1970), discussing the first amendment protection afforded commercial advertising while upholding a statute, 39 U.S.C. § 4009 (1970), which prohibits pandering advertisements in the mails. The court stated that "[t]he commercial element [of the advertisement] does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales." The court found that the public interest represented by the regulation perdominated over the first amendment interest furthered by the advertisement especially since "to the commercial element [of the advertisements] there [was] added a peculiar quality of offensiveness which adheres to solicitations appealing to the erotic interest." *See also* Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974).

35. *In re* Porterfield, 28 Cal. 2d 91, 168 P.2d 706 (1946), where, in holding unconstitutional a statute requiring a license to professionally solicit members for labor unions, the court stated that

> it cannot be said that the safeguards of the First Amendment . . . are wholly inapplicable to business or economic activity. In the last analysis the extent of permissible regulation of business or economic activity depends upon the balancing of social interests and the facts of any given case.

28 Cal. 2d at 102, 168 P.2d at 713 (citations omitted).

have limited *Chrestensen* to its narrow holding that public streets are not a protected forum for the dissemination of advertising matter. These courts have proceeded with a balance of interest analysis rather than follow the *Chrestensen* approach, which classifies the communication as unprotected "purely commercial advertising."[36]

Jamison v. Texas,[37] involved a *Chrestensen* type anti-litter ordinance, which also restricted the distribution of advertising matter. Ms. Ella Jamison, a Jehovah's Witness, distributed handbills touting a religious lecture, and also soliciting contributions, in return for which the donors would receive religious books.[38] Finding Jamison's purpose in distributing the handbills to be the "pursuit of a clearly religious activity" the Court distinguished the facts from *Chrestensen* and reversed the conviction.[39] *Chrestensen* was further distinguished in decisions reversing Jehovah's Witnesses' convictions for refusing to pay a municipal solicitor's tax[40] and for violating an ordinance prohibiting the distribution of handbills by ringing doorbells.[41]

In 1951, the Court faced a case falling between the extremes of the unprotected commercial purpose of *Chrestensen* and the protected religious purpose of *Jamison*. In *Breard v. Alexandria*,[42] a magazine subscription peddler was arrested for violating a municipal ordinance which prohibited solicitors from entering private property without the invitation of the occupants. The Court, balancing the privacy rights of the homeowner against the right of a large magazine subscription service to canvas from house-to-house, (and considering the rights of non-objecting homeowners) rejected the first amendment argument of the solicitor.[43]

Significantly, *Breard* did not attempt to define magazine soliciting as "purely commercial speech"; instead, the regulation of commercial speech was upheld by a balancing test weighed in the favor of privacy. The *Breard* approach illuminates a deficiency in *Chrestensen*: first amendment interests represented by "purely commercial advertising"[44] were not

36. *See* notes 34 and 35 *supra* and cases cited therein.

37. 318 U.S. 413 (1943).

38. *Id.* at 414-15.

39. *Id.* at 417.

40. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

41. Martin v. City of Struthers, 319 U.S. 141 (1943).

42. 341 U.S. 622 (1951).

43. *Id.* at 641-45.

44. Justice Douglas, dissenting to the Court's denial of certiorari in Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971), commented on the first amendment interests furthered by commercial speech:

The language of the First Amendment does not except speech directed at

explicitly considered by the *Chrestensen* Court in determining the validity of the governmental regulation. If *Breard* had followed *Chrestensen* and classified the solicitation as "purely commercial speech," the same decision would have been obtained but without evaluation of the first amendment interests furthered by the magazine solicitation.

Another deficiency in the *Chrestensen* approach is the difficulty in classifying communications as "purely commercial speech."[45] In the Jehovah's Witnesses cases, the Court had no problem finding that the activity represented more than "purely commercial speech" by examining the primary purpose of the Witnesses, which was to engage in protected religious activity.[46] Regarding regulation of newspaper advertising, the primary purpose test could lead to restrictions since the newspaper publishes advertisements for the primary purpose of financial gain.[47] Thus, in newspaper cases, the primary purpose test is inadequate since the Court has held that even though newspapers,[48] books,[49] and movies[50] are pro-

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> private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources.

Id. at 905. Commentators have also articulated the first amendment interests furthered by commercial speech:

> The assumption has been made . . . that speech promoting the sale of commercial services and products does not relate to interests served by the first amendment . . . . [C]ommercial advertising does, in fact serve those interests. By providing the consuming public with information, commercial speech aids in the attainment of society's goal of intellectual self-fulfillment and, more importantly, helps the individual to rationally plan his life to achieve the maximum satisfaction possible within the reach of his resources. In so doing it serves an important function as a catalyst in the achievement of personal self-realization.

Redish, *The First Amendment in the Marketplace*, 39 GEO. WASH. L. REV. 429, 472 (1971).

45. *See, e.g.*, New Left Educ. Proj. v. Board of Regents, 326 F. Supp. 158 (W.D. Tex. 1970); Wolfe v. City of Albany, 189 F. Supp. 217, 221 (M.D. Ga. 1960). For examples of the "large grey area in which it is exceedingly difficult to distinguish between so-called commercial activity and speech entitled to full constitutional protection," *see* Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761, 769 (1970).

46. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Martin v. City of Struthers, 319 U.S. 141, 142-43 (1943); Jamison v. Texas, 318 U.S. 413, 417 (1943).

47. The theoretical basis for the primary purpose test is weakest when the test is applied to advertisements appearing in publications produced by organizations motivated by a desire to maximize their profits since a viable free press needs an independent financial base, independent of the government. *See* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

48. *Id.*

49. Smith v. California, 361 U.S. 147, 150 (1959).

50. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).

duced for the primary purpose of financial profit, they are not excluded from the protection of the first amendment.

New York Times Co. v. Sullivan,[51] supplanted the primary purpose test. Evaluating the first amendment interests furthered by the *content* of an advertisement, the *Sullivan* Court determined that a particular advertisement was not "purely commercial speech." The Committee to Defend Martin Luther King and the Struggle for Freedom in the South submitted an advertisement to the *Times* which described Southern civil rights activities and criticized public authorities of certain Southern communities. A coupon soliciting contributions to further the work of the Committee appeared in the advertisement. Sullivan, the Commissioner of Public Affairs of Montgomery, Alabama, brought a libel suit against the *Times* as publishers of the advertisement. To counter the argument of the *New York Times* that the first amendment protected the advertisement from libel suits, Sullivan argued "that the constitutional guarantees of freedom of speech and of the press [were] inapplicable . . . because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement."[52] The Court answered Sullivan's argument, stating that "[t]he publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*."[53] Abandoning the primary purpose test of *Chrestensen-Jamison* and formulating criteria which examine *content*, the Court found that since the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern,"[54] the advertisement was not "purely commercial speech."

If courts must follow the *Chrestensen* approach of classifying certain advertisements as unprotected "purely commercial speech," the content test is a more preferable method of classification than the primary purpose test.[55] As illustrated by *Sullivan*, certain first amendment interests embodied in commercial expression can be weighed when the content of

51. 376 U.S. 254 (1964).

52. *Id.* at 265.

53. *Id.* at 266.

54. *Id.*

55. Commentators have been critical of the primary purpose test when used by the Court to determine whether a particular expression is "purely commercial speech," unprotected by the first amendment. "[The primary purpose] test provides no measure of the extent to which the functions of the first amendment demand that a particular expression be free from a particular regulation." *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1028 (1967).

the advertisement is examined by the court.[56] If the primary purpose test were applied to *New York Times Co. v. Sullivan* the advertisement would have been classified as "purely commercial speech" and hence unprotected.

Decisions subsequent to *Chrestensen* and prior to *Pittsburgh Press* indicated a reluctance to follow the *Chrestensen* approach of upholding governmental regulation of commercial expressions without analyzing the first amendment interests represented by the commercial speech.[57] Nevertheless, the *Pittsburgh Press* Court failed to deal the death-blow to *Chrestensen*, and instead classified the help-wanted advertisements as "classic examples of commercial speech."[58] Using the *Sullivan* content test, the Court found that the help-wanted advertisements did not state

> a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex nor [did] any of them criticize the Ordinance or the Commission's enforcement practices,[59]

but instead were "purely commercial speech" as distinguished from *Sullivan* protected speech. The newspaper's editorial judgment merges with

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> The difficulty with the use of the primary purpose test is that it makes little sense, either theoretically or practically. If it is acknowledged that an important aspect of the first amendment right is the listeners interest in acquiring knowledge of the existence of financial motives on the part of the speaker would seem irrelevant.

Redish, *The First Amendment in the Marketplace*, 39 GEO. WASH. L. REV. 429, 452 (1971).

> [A] motive test raises unmanageable problems of definition. Moreover, whose motive should be determinative—the author's, publisher's or distributors? A more fundamental defect of a motive's distinction is that it is irrelevant to the reasons why social, religious or political expression is protected.

Note, *Freedom of Speech in a Commercial Context*, 78 HARV. L. REV. 1191, 1203 (1965).

56. The primary purpose test is more restrictive than the content test since the former classifies as "purely commercial speech" all advertisements made for the primary purpose of financial gain while the latter gives first amendment protection to advertisements created by non-commercial authors who delegate to a profit motivated organization the task of disseminating the advertisement. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The content test is still objectionable since it does not directly allow consideration of the first amendment right of the public to information. For a discussion of the first amendment protection afforded the right to receive information and ideas, *see* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

57. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 735-38 (1970); Ginsberg v. United States, 383 U.S. 463, 474-76 (1966); Breard v. Alexandria, 341 U.S. 622, 641-45 (1951); Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189-92 (1948). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

58. 413 U.S. at 385.

59. *Id.*

the advertisements themselves to form "an integrated commercial statement."[60] The Court also discounted the petitioner's argument that

> commercial speech should be accorded a higher level of protection than *Chrestensen* and its progeny would suggest [since] . . . the exchange of information is as important in the commercial realm as in any other . . . .[61]

Instead the Court indicated that it did not specifically hold that all "classic examples of commercial speech" are unprotected by the first amendment. While the Court rejected the petitioner's argument here, it left future cases to decide what "the merits of this contention may be in other contexts . . ." which do not involve advertisements aiding illegal economic activity such as discrimination.[62] The Court suggested that the proper approach would be to balance "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal . . . [against] the governmental interest supporting the regulation."[63]

On the other hand, *Pittsburgh Press* did not specify the *extent* to which "purely commercial speech" is protected by the first amendment when the advertisements do not propose illegal commercial activity. In *Pittsburgh Press*, the commercial speech lacked significant first amendment interests and the balancing test was not used to uphold the regulation. The adoption of the content test in *Sullivan*[64] and the balancing language in *Pittsburgh Press*[65] indicate an unwillingness by the Court to interpret *Chrestensen* as giving rise to a talismanic exclusion of "purely commercial speech" from the protection of the first amendment.

When one argues that commercial speech is unprotected by the first amendment, one is forced to say that commercial speech does not represent any first amendment interests.[66] Commercial speech must be distin-

60. *Id.* at 388.

61. *Id.*

62. *Id.* at 388-89. Although the Court found that the advertisements solicited a "commercial activity [which was] . . . illegal" (i.e. discrimination in employment) and was "no differen[t] in principle" from "a want ad proposing a sale of narcotics or soliciting prostitutes" the Court was unwilling to base its decision that the Pittsburgh Press was not protected by the first amendment solely on the illegality furthered by the advertisements. Had the Court fully accepted the analogy to the narcotics and prostitution advertisements it would have been unnecessary to rely on the commercial speech doctrine of *Chrestensen*. *Cf.* Frohwerk v. United States, 249 U.S. 204, 206 (1919) (dictum); Camp-of-the-Pines, Inc. v. New York Times Co., 184 Misc. 389, 53 N.Y.S.2d 475 (Sup. Ct. 1945).

63. 413 U.S. at 389.

64. *See* text accompanying note 54 *supra.*

65. *See* text accompanying note 63 *supra.*

66. *See, e.g.*, Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied*, Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969):

guished from classes of expression such as obscenity,[67] recklessly made libelous statements,[68] solicitations of crime,[69] incitements of violent overthrow of the government[70] and fraudulent assertions[71] which are excluded from first amendment protection because of their inherent offensiveness.[72] In these situations the government has the power to proscribe the substantive evil which by definition emanates from the expression,[73] and which places the expression outside the scope of the first amendment.[74] When the expression falls into an inherently offensive class, the Court begins its analysis with a declaration that the class of expression is not protected by the first amendment and proceeds to determine whether the expression falls within the proscribed class and therefore can be regulated consistent with the first amendment. This approach is inapplicable to "purely commercial speech," since commercial speech is not inherently offensive.[75]

The government can constitutionally regulate commercial speech even though commercial speech, as a class, should not be excluded from the

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> Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. . . . [I]t does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression.

But see note 44 *supra.*

67. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973). *Cf.* California v. LaRue, 409 U.S. 109 (1972).

68. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

69. *See* cases cited in T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 600 (3d ed. 1967).

70. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

71. *See, e.g.*, Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948).

72. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . Such utterances . . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality.

73. The Supreme Court generally does not require that the expression, containing inherently offensive elements, create a "clear and present danger" that a substantive evil will occur. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). *But cf.* Wood v. Georgia, 370 U.S. 375 (1962). *See generally* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1203-12 (1959).

74. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

75. While this approach is not applicable to the class, commercial speech, it is applicable to that commercial speech which does contain inherently offensive elements. *See* discussion at note 89 *infra.*

protection of the first amendment. The Supreme Court has rejected the absolutists' position that the first amendment prohibits, without exception, *all* laws "abridging the freedom of speech, or of the press."[76] Through the years, the Court has used the "bad tendency test,"[77] the "clear and present danger test,"[78] and the "ad hoc balancing test"[79] to uphold laws limiting freedom of speech and press. A rejection of the *Chrestensen* doctrine of excluding commercial speech from the protection of the first amendment would raise the issue of how the first amendment interests furthered by commercial advertising are to be reconciled with the governmental interests supporting the regulation of commercial speech.

The governmental regulation of commercial advertising for the stated purpose of limiting economic activity represents a collision between the first amendment interests furthered by the advertising, the right of consumers to information needed to conduct their economic affairs, and the governmental interest in limiting economic activity. The Court has generally upheld governmental limitations of economic activity if the limitation is reasonably related to a valid governmental purpose.[80] This policy of giving the legislatures wide latitude in the area of economic regulation[81] led to the adoption of the *Chrestensen* doctrine. The Court in *Chrestensen* stated:

> Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.[82]

The first amendment, which prohibits laws abridging the freedom of speech, or of the press precludes this "mere rationality test" as a standard for evaluating regulations limiting expression.[83]

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76. *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 49-51 (1961).

77. Gitlow v. New York, 268 U.S. 652 (1925). *But cf.* American Communications Ass'n v. Douds, 339 U.S. 382, 395 (1950).

78. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919). For a history of the "clear and present danger test," from its beginnings to its demise *see* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970); Strong, *Fifty years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

79. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959).

80. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). *But cf.* United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

81. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

82. 316 U.S. 52, 54 (1942).

83. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

Recently, the Supreme Court has applied a definitional balancing test to determine the scope of the first amendment.[84] The definitional balancing test which "draws the constitutional line generically, by determining the meaning of constitutional guarantees for different classes of situation[s]"[85] is significantly different than the ad hoc balancing test which "decid[es] whether the interest of a particular litigant in freely expressing views which the judge may consider loathsome, dangerous, or ridiculous is outweighed by society's interest in 'order,' 'security,' or national 'self-preservation.' "[86] Professor Strong has proposed that, in free speech controversies, the Court apply the definitional balancing test coupled with a renovated clear and present danger test requiring that "legislation and equivilant forms of articulated government policy . . . bear such a close and immediate nexus to valid objectives beyond the reach of the first amendment that there is no danger of jeopardy to the value protected by that amendment."[87] This two stage approach could be used by the Court to resolve first amendment challenges to regulations of advertising content.

The first stage of Professor Strong's approach requires that the Court define, using a balancing process, for the class of expression before the Court, the portion of the class which is protected speech. An example of this definitional balancing can be found in *New York Times Co.* v. *Sullivan*[88] where the Court, confronted with the class—libelous statements—drew the line for protected speech between negligently and recklessly made false statements. The definitional balancing test can be used to determine the demarcation point between protected and unprotected speech for various classes of commercial speech. The classes of commercial speech can be determined by the subject matter of the challenged regulation. Laws restricting the content of advertising are either directed at general inherently offensive advertising such as false,[89] deceptive,[90]

84. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

85. Strong, *supra* note 78, at 64.

86. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1434-35 (1962).

87. Strong, *supra* note 78, at 75.

88. 376 U.S. 254 (1964).

89. *See, e.g.*, ILL. REV. STAT. ch. 121½, § 157.21a (Supp. 1973); OHIO REV. CODE ANN. § 2911.41 (Page 1973). *See generally* Barnes, *False Advertising*, 23 OHIO ST. L.J. 597 (1962).

90. *E.g.*, 15 U.S.C. § 45(a)(1) (1970). *See generally Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967). For a discussion of the Federal Trade Commission's role in combatting deceptive advertising, *see* Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269 (1966).

fraudulent,[91] or obscene advertising,[92] or advertising of a particular product or service such as food and drugs,[93] alcoholic beverages,[94] securities,[95] or legal services.[96] For purposes of the definitional balancing test, the classes could be constructed along similar lines. For the inherently offensive classes of advertising, the Court would balance the first amendment value of the particular class against the governmental interest in the regulation. Since less weight may be afforded the commercial expression, the Court in balancing could determine that the line between protected and unprotected speech be drawn at a different point than for the same type of offensive but non-commercial expression.

For the product-service classes of advertising, the Court could also define the constitutionally protected speech within the class. The greater the potential for harm arising from the particular product or service, the less constitutional protection would be afforded the advertising. Expressed another way, the greater the governmental restrictions on the sale of the product or service, the less protection accorded to the advertising. Once the class of advertising is broken down between protected and unprotected speech, the second stage of Professor Strong's approach is the determination that the governmental regulation be "closely and intimately" connected to a valid governmental objective determined by the stage one definitional balancing test. If the governmental regulation of advertising is drafted so as to affect only advertising which, by definitional balancing is excluded from the protection of the first amendment, there would be no problem in determining that a close nexus exists between the governmental regulation and a constitutionally permissible state objective. On the other hand, if the governmental regulation of advertising limits advertising entitled to constitutional protection "it would be self-evident that no tight nexus could possibly be demonstrated between the

91. *See, e.g.*, 18 U.S.C. § 1341 (1970).

92. *See, e.g.*, CAL. PENAL CODE § 311.5 (West 1970); ILL. REV. STAT. ch. 38, § 11-20(a)(6) (Supp. 1973).

93. *See, e.g.*, 15 U.S.C. § 52 (1970); 21 U.S.C. § 301 (1970). For a critical discussion of restrictions on retail drug price advertising, *see* Note, *Retail Drug Advertising Bans Are Bad Medicine For Consumers—Is There a Sherman Act Prescription*, 15 ARIZ. L. REV. 117 (1973). *See also* Recent Decisions, *A Statute Which Prohibits the Advertising of Prescription Drug Prices is Unconstitutional*, 37 BROOKLYN L. REV. 617 (1971).

94. *E.g.*, 27 U.S.C. § 205 (1970).

95. *E.g.*, 15 U.S.C. §§ 77, 78 (1970).

96. *E.g.*, MICH. COMP. LAWS § 750.165 (Supp. 1972). *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, EC 2-9 (1969). For the argument that the first amendment compels liberalization of the current restrictions on advertising of legal services, *see* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

applicable state law and a constitutionally permissible objective of the state."[97]

Applying Professor Strong's approach to *Pittsburgh Press,* one must determine to what extent help-wanted advertising is protected by the first amendment. Accepting Professor Emerson's four functions of a system of freedom of expression—to assure "individual self-fulfillment," advance "knowledge and discover truth, . . . provide for participation in decision making by all members of society," and achieve "a more adaptable and hence a more stable community"[98]—the first amendment interests furthered by help-wanted advertising become evident. Help-wanted advertising provides job seekers with employment information and aids in the attainment of suitable employment, thus indirectly contributing to individual self-actualization. Arguably, by being employed the individual will be more able to participate in the decision-making processes of society. Help-wanted advertising not serving these first amendment interests can not be protected. Hence, help-wanted advertising which aids employment discrimination must be excluded from first amendment "speech" since it effectively retards individual self-fulfillment and participation in the decision-making procedures—both preferred first amendment interests.

Once help-wanted advertising which aids sex discrimination is found to lay outside the scope of the first amendment, it is obvious that a "close and intimate nexus" exists between the Pittsburgh Ordinance and the valid governmental purpose of preventing advertising furthering employment discrimination by sex. Thus, the same result reached by the Supreme Court in *Pittsburgh Press* could have been obtained by disregarding the "commercial speech doctrine" and by relying upon an approach which adequately provides for the possible first amendment interests represented by commercial advertisements.

Regulations primarily directed at the manner of dissemination of the advertisements,[99] however, require a different analysis. Whether such a regulation abridges freedom of expression depends in many instances on whether the advertiser has alternative forums available to disseminate his information.[100] Since the constitutionality of the regulation is dependent upon factors peculiar to the individual case, the most appropriate analysis

97. Strong, *supra* note 78, at 78.

98. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

99. An example of such a regulation is discussed in Comment, *Billboard Regulations, and Aesthetics,* 21 CLEV.-MAR. L. REV. 194 (1972).

100. *Compare* Breard v. Alexandria, 341 U.S. 622 (1951) *with* Martin v. City of Struthers, 319 U.S. 141 (1943).

for this group of regulations is the ad hoc balancing test.[101] In following this test "the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression."[102] Courts should consider whether the governmental purpose in regulation could be served by using a less onerous alternative restriction.[103]

By applying the definitional balancing test for content regulations and the ad hoc balancing test for medium regulations, courts can determine whether governmental restrictions on advertising unduly encroach upon freedom of speech and press. But because of *Chrestensen*, the majority of federal and state courts consider "purely commercial advertising" outside the scope of the first amendment. Until the Supreme Court explicitly rejects the broad interpretation of *Chrestensen*, many courts will continue summarily dismissing first amendment challenges to governmental regulation of advertising, even though the consumers' right to information is in jeopardy.

It is unfortunate that the Supreme Court did not seize upon the opportunity presented by *Pittsburgh Press* to renounce *Chrestensen*. Although the language of *Pittsburgh Press* is ambiguous, it can still be read as support for excluding commercial advertisements from first amendment protection. On the other hand, the *Pittsburgh Press* Court, while mentioning *Chrestensen*, did look beyond the commercial nature of the help-wanted advertisements to justify upholding the human relations ordinance. The Court expressed two other justifications: the commercial activity proposed by the advertisements was illegal and the restriction on the advertising was "incidental to a valid limitation on economic activity."[104] A reasonable inference can be drawn from *Pittsburgh Press* that the commercial nature of an expression can not be the sole basis for excluding commercial advertisements from first amendment protection. Accepting this interpretation of *Pittsburgh Press* the present Court will explicitly reject the *Chrestensen* doctrine if given the proper opportunity.

Bradford E. Block

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101. *See* note 79 *supra*.

102. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912 (1963).

103. *See* Lamont v. Postmaster General, 381 U.S. 301, 308-09 (1965) (Brennan, J., concurring). *See generally* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

104. 413 U.S. at 389.